

(2016) 03 DEL CK 0024

In the Delhi High Court

Case No : CS(OS) 3310 of 2012 and I.A. No. 21133 of 2012

Om Parakash Yadav and others

APPELLANT

Vs

Kanta Yadav and others

RESPONDENT

Date of Decision : 14-03-2016

Acts Referred:

Specific Relief Act, 1963 — Section 34
Succession Act, 1925 — Section 213

Citation : (2016) 162 AIC 476 : (2016) 228 DLT 591 : (2016) 156 DRJ 473 :
(2016) 3 RajdhaniLR 544

Hon'ble Judges : Vipin Sanghi, J.

Bench : Single Bench

Advocate : Ms. Syed Hasan Isfahani, Advocate, for the Appellant; Mr. Jugal Wadhwa and Mr. Rishabh Wadhwa, Advocates, Mr. Sanjay Dewan, Advocate along with SI Vikas Mudgal, Advocate for Delhi Police, for the Respondent

Final Decision : Disposed Off

Judgement

Vipin Sanghi, J. - I.A. No. 9419/2016

Learned counsel for the Investigating Officer (IO) states that due to inadvertence, the IO had sent the Will and the Codicil to the CFSL for obtaining a second report since the first report was not conclusive. He submits that the original Will have since been received from the CFSL and have already been placed on record.

2. In view of the said position, no further orders are called for in the present application. The application stands disposed of.

I.A. No. 14607/2015

3. This application has been filed by the defendants to seek rejection of the plaint on the ground that the suit filed for seeking the relief of declaration and permanent injunction premised on an unregistered Will and Codicil is not maintainable and is hit by Section 34 of the Specific Relief Act as well as Section

21 3 of the Succession Act.

4. The plaintiffs have filed the suit to seek the following reliefs:

"A. A decree of declaration of ownership rights in favour of the plaintiffs qua the properties under the respective possession as following:

- a. Ownership rights to the extent of 1/4th share each in the new house built in the native village Aasiaki, Panchoor, District Rewari (Haryana) along with the building and tube well in favour of the plaintiffs herein.
- b. Ownership rights in the property number 9988-C at New Rohtak Road, New Delhi in favour of the plaintiff number 2.
- c. Ownership rights in the properties no. 321/2ZA and 321/2ZA-1 at Than Singh Nagar, Anand Parbat, Delhi-110005 in favour of the plaintiff no. 2.
- d. Ownership rights in the property no. A-1 Kailash Park, New Delhi in favour of the plaintiff no.2.

B. A decree of permanent and perpetual injunction in favour of the plaintiffs and against the defendants from attempting to dispossess the plaintiffs from the properties in their respective possession."

5. The said reliefs are premised on the averments that one Zorawar Singh was the owner of the several properties enlisted in paragraph 2 of the plaint, which he acquired from his own resources. He expired on 04.01.1984. The said Zorawar Singh is the father of the parties. The plaintiffs claim that Zorawar Singh bequeathed his self-acquired properties to his spouse late Smt. Ram Pyari Yadav and the parties to the suit in terms of his Will dated 16.06.1985 executed at Delhi.

6. The plaintiffs further claim that the said Will was modified by the Codicil executed by late Sh. Zorawar Singh on 21.10.1985 at Delhi. The plaintiffs in paragraph 5 set out the devolution of the properties of late Sh. Zorawar Singh in terms of the Will and the Codicil in the following manner:

"a. The agricultural land approximately measuring 30 acres acquired out of his own personal resources during his lifetime and situated in the native village at Aasiaki, Panchoor, District Riwari (Haryana) came to the share of his two sons Braham Parkash and Gyan Parkash (Defendants no.3 and 4) who have been in possession of the same and have been using it for agricultural purposes.

b. The new house built in his native village along with the building and tube well came to the share of his wife Late Smt. Ram Payari Yadav during her life time and thereafter all his four sons, the plaintiffs and the defendants 3-4 herein.

c. The ancestral agricultural land and the old house in the village came to the share of all the parties herein in equal share.

d. The property number 9988-C at New Rohtak Road, New Delhi was to vest in

his wife Smt. Ram Pyari Yadav during her lifetime and was to vest thereafter in the plaintiff number 2.

e. The properties bearing number 321/2ZA and 321/2ZA-1 measuring 375 sq yds at Than Singh Nagar, Anand Parbat, Delhi-110005 were bequeathed to his wife, late Smt. Ram Pyari Yadav with exclusive ownership rights.

f. The vacant plot no. A-1 Kailash Park, measuring 125 sq yards, New Delhi was bequeathed to the plaintiff no.2."

7. The plaintiffs claims in paragraph 7 of the plaint that they have been using their respective shares in the properties left by late Sh. Zorawar Singh. The plaintiffs further claim that the mother of the parties executed a Registered Will dated 18.06.2009, whereby she bequeathed property bearing No.321-2-Z-A and 321-2-Z-A-1, Than Singh Nagar, Anand Parbat, Delhi - 110005 in favour of the plaintiff No.2. It is stated that the mother of the parties expired on 01.11.2009.

8. The plaintiffs claim that the defendants are seeking to raise a dispute which has led to registration of a First Information Report. The plaintiffs also disclose that defendant No.1 instituted Civil Suit No.430/2012 seeking partition of the property bearing No.998-C, New Rohtak Road, Delhi on the premise that Sh. Zorawar Singh and late Smt. Ram Pyari Yadav died intestate, although to the knowledge of the defendant No.1, they had executed the aforesaid Will and Codicil. On this basis, the plaintiffs have sought the relief as sought out herein above.

9. The submission of learned counsel for the applicant/defendants is that a suit to seek declaratory relief in respect of a Will and consequential relief of injunction is not maintainable. The submission is that the plaintiffs are obliged to seek Letters of Administration in respect of the two Will/Codicil and only thereafter the plaintiffs can maintain a suit for declaration/injunction. In this regard, reliance is placed on the following decisions:

(i) Manmohan Singh and Another v. Joginder Kaur and Others, 2002 (64) DRJ 293; and

(ii) Priyanka Vivek Batra v. Neeru Malik and Others, 154 (2008) DLT 354.

10. Learned counsel for the defendants has also referred to Section 213 (1) of the Indian Succession Act, which provides that:

"No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed".

11. The application is opposed by the plaintiffs, who points out that in Delhi, there is no need to obtain a Probate or Letters of Administration in respect of a Will. Learned counsel submits that Section 213 (2) provides that the said section shall not apply in the case of Wills made by Muhammadans or Indian Christians

"and shall only apply-

(i) in the case of Wills made by any Hindu, Buddhist, Sikh or Jaina where such Wills are of the classes specified in clauses (a) and (b) of section 57... ..".

12. Learned counsel submits that the class that clause (a) of Section 57 sets out is "Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay".

13. Learned counsel submits that since the Will and the Codicil have been executed in Delhi by Hindu, Section 213(1) has no application in respect of the Will and Codicil in question.

14. Having heard learned counsel and perused the aforesaid decisions, I am inclined to allow this application. In Manmohan Singh (supra), this Court has exhaustively dealt with the same issue as raised by the defendants. In paragraphs 51, 58 and 59, the Court has held as follows:

"51. As is apparent from the aforesaid provisions of the Indian Succession Act there is no provision under this Act entitling a person to file the suit for declaration except in the three eventualities viz. firstly where the party who has been evicted from the possession; secondly a person must possess a letter of administration before filing any suit and thirdly where there is a contention that proceedings shall take as nearly as may be a form regular suit. None of the aforesaid three condition exists in the instant case. Apart from this, suit for declaration is also barred by the provisions of Section 34 of the Specific Relief Act, as such a suit is not maintainable on the basis of a unregistered. Will in respect of which no probate has been obtained nor letters of administration have been obtained. If the plaintiff is allowed to" maintain such a suit it will be an unending process as even after obtaining a declaratory decree the plaintiff shall not have any consequential relief nor would be plaintiff be in a position to take back the possession from those who are in possession of the premises.

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58. Further since Section 276 of the Indian Succession Act specifically provides for petition for probate any other remedy is forbidden. However to say that the probate is not necessary in Delhi and, therefore, the plaintiff has an alternative remedy by way of filing the suit is wholly untenable as the issue in the case is whether the suit for declaration is maintainable or not. In the absence of any explanation as to why the plaintiff did not seek a probate or letter of administration on the basis of Will when the law specifically provides such a remedy the plaintiff cannot maintain the simpliciter suit for declaration and, therefore, the ratio of the case relied upon by the learned counsel for the plaintiff in Santosh Kakkar and others v. Ram Prasad and others, 71 (1998) DLT 147 :

1998 (47) DRJ 860 is not applicable at all.

59. It is beyond the pale of controversy that suit under Section 208, 214 and 295 can be filed only for obtaining a specific relief just like against dispossession but not in a suit for declaration by way of substitute to a probate petition."

15. Similarly in *Priyanka Vivek Batra* (supra), this Court has relied upon the judgment of the Madhya Pradesh High Court in *Ram Shankar v. Balakdas*, AIR 1992 MP 224, to hold that in a Civil Court no issue can be struck to decide if the Will is the last valid Will of the deceased, or not. The Court also placed reliance on *Manmohan Singh* (supra) for the same proposition.

16. It is well-settled that a proceedings to obtain Probate/Letters of Administration in respect of a Will are proceedings in rem. It is for this reason that the Probate Court is obliged to cause publication of the citation so as to invite objections in respect of the Will propounded by the executor/petitioner. However, in a civil suit between the parties, the said procedure is not required to be adopted. Consequently, once there is a dispute raised inter parties in relation to the Will/Codicil left by their ancestor, filing of a simpliciter suit for declaration and consequential injunction is not maintainable.

17. In *Priyanka Vivek Batra* (supra), the Court went on to hold as follows:

"7.

E. Section 34 of Specific Relief Act permits seeking of declaration of any legal character or right to any property. However, here, the right to property claimed by the plaintiff is dependent upon the Will dated 29th October, 2002 being held to be validly executed last Will of deceased and which will be held in pending probate proceedings. So the declaration sought is dependent upon the outcome of the probate proceedings. Though if probate is granted, the plaintiff would be deemed to have inherited the estate under the Will from the moment of demise (inasmuch as title does not remain in abeyance), but the fact remains that the plaintiff as on the date of institution of suit and even today has a mere chance or hope of having title to the property. In fact, no declaration can be made till the outcome of the probate proceedings. Even if inquiry is held whether the defendant No. 1 was the Benami and deceased real owner of the properties and declaration pursuant thereto made, the said declaration will be ineffectual and abortive in the event of probate of Will dated 29th October, 2002 failing."

18. The Court further held:

"10. The plaintiff has, besides the relief of the declaration, with respect to which, as aforesaid, the plaint is liable to be rejected, has also claimed the relief of permanent injunction restraining the defendants from dealing with the properties with respect to which declaration is claimed. The relief of permanent injunction has been claimed as a consequential relief to the relief of declaration. Once it is held that the plaint for relief of declaration is liable to be rejected/dismissed, the plaint insofar as for the relief of permanent injunction is

concerned also does not survive. Be that as it may, the relief of permanent injunction is also barred by the provisions of Section 41(h) of the Specific Relief Act. The plaintiff has equally efficacious relief of protecting the estate of the deceased by applying to the probate Court under Part VII, Chapter XXIII of the Indian Succession Act, 1925. It has been held in *Cotton Corpn. of India v. United Industrial Bank*, (1983) 4 SCC 625 : AIR 1983 SC 1272 that the relief of permanent injunction is barred by the provisions of Section 41 of the Specific Relief Act."

19. Thus, it would be seen that it has been the consistent view of this Court that a suit for declaration and consequential injunction is not maintainable founded upon a Will/Codicil unless Probate/Letters of Administration in respect of a Will have been obtained. The plaintiffs have an equal and alternate efficacious remedy of preferring a testamentary case and it is open to the plaintiffs to seek interim injunctive relief even in such proceedings.

20. Thus, the present suit is held to be not maintainable and the same stands dismissed for that reason.

21. The application is allowed and the suit is dismissed.

22. All applications also stand dismissed.